door open, and stole money from under the bed. Kane is serving time in Federal prison right now. He has a motion pending for a downward departure and has had discussions with others about what he needs to do and say to get a downward departure.

9) Frederick Street, incarcerated at the time of this trial in connection with a Federal sentence on a plea of guilty to a Conspiracy to Posses and Distribute Crack Cocaine, agreed to cooperate with the Government pursuant to the plea agreement. Street was sentenced to 300 months. If the Government believes Street's cooperation is substantial, then the Government could ask Street's sentencing court to reduce his sentence. Street is obviously hoping that happens. He was debriefed by agents on a few occasions after his guilty plea; and, he gave information. He testified at this trial that he had drug transactions with the Defendant. Street doesn't know the Defendant to carry a firearm and he doesn't remember ever seeing one on the defendant. Street was charged with more than one (1) count of drug dealing; and, the Government dismissed some of those counts as a result of Street entering the plea. Now, Street is hoping to get a further reduction of his sentence for testifying.

10) Christopher Anthony Thompson, incarcerated at the time of this trial pursuant to a sentence he received after entering into a plea agreement with the Government, agreed to cooperate with the Government in a plea agreement. Thompson was sentenced to 188 months. He was debriefed after he was arrested, and after he entered into a plea agreement. He provided substantial information about a number of individuals and received a sentence reduction for prior cooperation. His sentence was reduced to 96 months. Thompson has been promised he's going to get another sentence reduction as long as he was truthful and complied all the way up with his Plea Agreement. The Plea Agreement was entered May 16th, 2002. Thompson has cooperated with the Government since that date. He has testified in cases

since that date, including in front of Grand Juries about eight (8) times. He testified at this trial that he saw the Defendant engaging in drug transactions, and that he personally had drug transactions with the Defendant. Thompson himself was a drug dealer. Thompson was sentenced to 188 months, received one reduction which cut his sentence in half, and is expecting a further Rule 35 reduction if he keeps his part of the agreement (and keeps cooperating). Thompson has been convicted of four (4) felonies and has a suspended sentence hanging over his head. His previously suspended time had been revoked due to his new conviction. He has already had his violation hearing; and, all his time has been resuspended (with the exception of "two months here, and one (1) month there"). These resuspensions occurred after Thompson also entered into the plea agreement with the Federal Government. Thompson got resuspended time on some of his State sentences. For the State sentences that occurred after Thompson entered his Plea Agreement, the State Judge was told about this plea and cooperation with the Federal Government.

11) Mr. Marti Lamond Turner, incarcerated at the time of this trial in connection with a sentence he received pursuant to his entry into a plea agreement with the Government, agreed to cooperate in that plea agreement. Turner received nineteen (19) years to serve. There is a provision in the plea agreement that the Government could ask Turner's Sentencing Judge for a sentence reduction if Turner gives substantial assistance to the Government. Turner was debriefed and provided information after he entered into that plea agreement. He has previously testified in trials and Grand Juries about that information he provided. He testified at this trial that he saw the Defendant engaging in drug transactions, and that he personally had drug transactions with the Defendant. Turner was always dealing crack, and specialized and focused on selling crack cocaine. Turner is serving a 228-month sentence in prison. The plea

agreement mentions something about a Rule 35 sentence reduction if Turner cooperates. He is hoping to get a reduction for cooperating.

12) LaShawn Barlow, incarcerated at the time of this trial on a Federal sentence in connection with a plea agreement entered into with the Government, agreed to cooperate in that plea agreement. Barlow was given a sentence of 300- some months. He plead to two (2) counts of an indictment charging him with Possessing a Firearm in Furtherance of a Drug Trafficking Crime and Conspiring to Possess with the Intent to Distribute Crack and to Distribution of Crack. The Government told Barlow that if his cooperation is substantial, the Government could ask the Sentencing Judge to reduce Barlow's sentence. Barlow is hoping that happens. Barlow is also serving a state sentence concurrently with the Federal time. Barlow has two (2) other felony convictions within the last ten (10) years. After he plead guilty, he was debriefed by Federal agents and gave information. Barlow has been dealing drugs since he was 13 and he was 27 at the time of trial. He testified at this trial that he had drug transactions with the Defendant. Barlow is being held in the Federal prison in Petersburg, Virginia, where Frederick Street is also being held. Barlow and Street talk, but not about the Defendant. Barlow is serving 346 months in prison pursuant to the plea agreement, which has a provision to reduce his sentence if he cooperates. The Government has not yet asked for a reduction; but Barlow is hopeful the Government will make the request soon.

13) Joseph Becnel, Jr., incarcerated at the time of this trial on a Federal sentence in connection with a plea agreement entered into with the Government, agreed to cooperate in that plea agreement. If Becnel cooperates substantially, the Government can ask the sentencing court to reduce Bednel's sentence. A sentence reduction motion was filed; and, Becnel's sentence was reduced from 145 months to 60 months. Other than the felony conviction for which

Becnel is serving time, he has one (1) or two (2) other felony convictions within the last ten (10) years. He is currently serving time on the charges of Possession with Intent to Distribute and Possession of a Firearm by a Convicted Felon. He has been dealing drugs since around 1990, when he was 19 or 20. After he entered the plea agreement, he was debriefed by Federal Agents and provided information. Becnel testified at this trial that he had drug transactions with the Defendant.

14) Grant Womack, incarcerated at the time of this trial pursuant to a plea agreement entered into with the Government in San Antonio, Texas, agreed to cooperate in that plea agreement. After his plea, Womack was debriefed by Federal Agents and provided information. Womack testified at this trial that he had drug transactions with the Defendant. Womack never saw the Defendant with a firearm. Womack received a five (5) year sentence in Texas.

15) Salvatore Lopiccolo, incarcerated at the time of this trial in connection with a plea agreement entered into with the Government, agreed to cooperate in that plea agreement. The plea agreement provides that if the Government believes Lopiccolo's cooperation is substantial, then the Government can file a sentence reduction motion. A sentence reduction motion was filed; and, Lopiccolo's sentence was reduced from 135 months to 66 months. Lopiccolo was debriefed by agents after he plead guilty; and subsequently provided information and testified before Grand Juries and at trials. That is all part of the cooperation that was considered when his sentence was reduced. Other than the felony conviction he is currently serving time for, he has been convicted of one (1) other felony. Lopiccolo testified at this trial that he had drug transactions with the Defendant. Lopiccolo never saw a gun on the Defendant. The defendant was convicted of eight separate counts of Use, Carry, and Possess Firearm during a Drug Trafficking Crime. The first firearm conviction was attributed a sixty month or

five year minimum. The following seven were each attributed a minimum twenty-five year punishment.

REASONS FOR GRANTING THE PETITION

1. No rational fact finder could find Hughes guilty beyond a reasonable doubt of the alleged drug offenses because the sole evidence against the Defendant was the testimony of co-defendants.

DID THE COURT ERR IN FINDING THE DEFENDANT GUILTY BEYOND A REASONABLE DOUBT WHERE THE GOVERNMENT'S EVIDENCE WAS INSUFFICIENT TO SUPPORT SUCH A FINDING.

The standard of review for sufficiency of the evidence is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979).

Discussion of Issue

The sole evidence relied on by the Government for all of Hughes' convictions is based on the testimony of his co-defendants. All of the witnesses against him had a clear incentive to shift blame away from themselves and assign blame to another person. All of these witnesses have plead guilty to their respective charges in exchange for receiving any or all of the following benefits:

1) The dismissal of at least some of their counts charged under Federal indictments;

2) The receiving of credit for "acceptance of responsibility" sentence discounts;

3) The consideration given by the prosecution and by the sentencing judge who takes the witnesses' cooperation

into consideration before the sentence is pronounced; and

4) The opportunity to receive sentence reductions, both at the sentencing hearing and thereafter.

When given an exchange for promises, all of their testimony becomes highly suspect. Highly suspect testimony should not be the basis for convictions beyond a reasonable doubt.

In Lee v. Illinois, 476 U.S. 530, 546 (1986), the Supreme Court of the United States held that ". . .a co-defendant's confession inculpating the accused is inherently unreliable". The government offered no proof other than co-defendant's confessions and testimony. As such, the entirety of the government's evidence is inherently unreliable.

When looking at the whole of the evidence, it is clear that the case put forward by the government lacked sufficient evidence to warrant a finding by the Court that Hughes was guilty beyond a reasonable doubt of the drug offenses.

2. It is cruel and unusual punishment to add subsequent conviction enhancement provisions of 18 U.S.C. § 924 (c) (1)(C)(1) (2000) to charges that are adjudicated and sentenced at the same event. For a charge to be considered a subsequent conviction a prior, separate and distinct conviction order should already exist.

DID THE COURT ERR IN ENHANCING THE APPELLANT'S GUIDELINES WHERE THE APPELLANT'S PRIOR CONVICTIONS WERE NOT PRESENTED TO THE JURY AND THE JURY MADE NO FINDING THAT APPELLANT WAS PREVIOUSLY CONVICTED OF ANY CHARGES.

Standard of Review

The standard of review is based on whether the sentence imposed constituted clear error as it exceeded the maximum sentence of the jury verdict. United States v.

Hammoud, 125 S.Ct. 1051 (2005)

Discussion of the Issue

Pursuant to 21 U.S.C. §851(a)(1), the government introduced Mr. Hughes' prior convictions for sentencing enhancement purposes. The prior convictions were used for enhancement of punishment under 21 U.S.C.§841(b)(1)(A) and to sentence Mr. Hughes to life in prison. There were three prior state court convictions introduced:

1. Possession with Intent to Distribute Marijuana, Offense date December 29, 1998; Hampton Circuit Court, Conviction on October 14, 1999 of §18.2-248.1 of the Code of Virginia, 1950, as amended;

2. Possession with Intent to Distribute Marijuana on School Property, Offense Date December 29, 1998; Hampton Circuit Court, Conviction on October 14, 1999 of §18.2-255.2 of the Code of Virginia, 1950, as amended;

3. Possession with Intent to Distribute Cocaine, Offense date March 7, 2002; Gloucester County Circuit Court, Conviction on April 15, 2003 of §18.2-248 of the Code of Virginia, 1950, as amended.

Because 21 U.S.C. §841(b)(1)(A) enhanced punishment for prior convictions operate as "the functional equivalent of an element of a greater offense," the Sixth Amendment requires that they be found by a jury Schriro v. Summerlin, No. 03-526 (June 24, 2004) Ring v. Arizona, 536 U.S. 584 (2002).

In support of the indictment for violation 21 U.S.C. §846, the United States presented a series of witnesses who alleged conduct that began in the early 1990s and continued through early Winter, 2002. All of this conduct predates the April 15, 2003 conviction in the Gloucester County Circuit Court, and most of this conduct predates the convictions on October 14, 1999 in Hampton Circuit Court.

The defendant's prior convictions also present an

important issue in light of Blakely v. Washington. The jury must find beyond a reasonable doubt that Mr. Hughes was convicted of two or more felonies before committing the current violation. Because 21 U.S.C. 841(b)(1)(A) enhanced punishment for prior convictions operate as "the functional equivalent of an element of a greater offense," the Sixth Amendment requires that they be found by a jury. Schiro v. Summerlin, Ring v. Arizona, 536 U.S. 584 (2002).

The United States Supreme Court has recently decided Shepard v, United States, decided March 7, 2005. United States v. Taylor, 495 U.S. 575 (1990) held that a court sentencing under the Armed Career Criminal Act could look to statutory elements, charging documents, and jury instructions to determine whether an earlier conviction after trial was for generic burglary. In Shepard, the Court was asked whether a sentencing court can look to police reports or complaint applications to determine whether an earlier quilty plea necessarily admitted, and supported a conviction for generic burglary. The Court held that a sentencing court is limited to examing the statutory definition, charging document, written plea agreement, transcript of a plea colloquy and any explicit factual finding by the trial judge to which the defendant assented.

Thus, the relevant inquiry to determine whether Hughes' alleged prior convictions qualify him for enhanced punishment goes beyond merely a listing of prior convictions. It includes a factual inquiry and questions of whether the relevant conduct or overt acts charged in support of the prior conviction occurred. The government's only evidence of prior convictions is an information that lists his prior convictions. These were not submitted to the jury, and the jury made no finding that the prior convictions were founded as fact.

Blakely applies to Sentences determined under the U.S. Sentencing Guidelines. The Sentencing Guidelines are legislatively created, and they are therefore governed by

theSupreme Court's decisions. Therefore, after Blakely, the only facts or factors that can be used to increase a defendant's sentence under the federal sentencing guidelines are those that (1) have been indicted and (2) either have been found by a jury to exist beyond a reasonable doubt or have been admitted by the defendant at a plea hearing. The use of any other fact or factor violates that defendant's right to indictment and right to jury trial. The U.S. Probation Officer included criminal history information from alleged previous convictions presented to the court but not to the jury. Therefore, the prior convictions cannot be used to increase his sentence without violating Mr. Hughes's rights under the Fifth and Sixth Amendments. Criminal history points were assigned for the October 17, 1999 conviction for carrying concealed weapon for which Mr. Hughes was sentenced to 12 months in jail. During the jury trial of this case, no evidence was presented to the jury of Mr. Hughes criminal history. The jury made no finding fact that Mr. Hughes had been convicted of an offense on October 14, 1999 or that he received a jail sentence. The Guidelines calculation accompanying the Presentence Investigation Report filed in this case improperly scores the defendant's criminal history and impermissibly enhances his sentence. Thus, the court should have found that Hughes's criminal history is a category I.

The chain of events surrounding Mr. Hughes' conviction should be considered one continuing offense for sentencing purposes, or alternatively, that prior to his convictions at trial, Mr. Hughes had zero convictions under § 924(c) (1); therefore, he should have received five years for each count and not the twenty-five year enhancement provided for "second or subsequent convictions" under § 924 (c) (1) (C) (i).

DID THE COURT ERR IN CALCULATING THE ENHANCED PUNISHMENT FOR SECOND AND SUBSEQUENT FIREARM

CONVICTIONS WHEN THE "SECOND AND SUBSEQUENT CHARGES" WERE FINALIZED IN THE SAME TRIAL AND SENTENCING EVENT AND WERE PART OF THE SAME CONSPIRACY

Standard of Review

The appellate court reviews the district court's interpretation of the enhancement provision of 18 U.S.C. §924 *de novo.* United States v. Alaniz, 235 F.3d 386 (8th Cir. 2000).

Discussion of Issue

Hughes was convicted in one trial of a total of eight counts of Carrying or Using a Handgun in relation to a Drug Transaction. Carrying a Handgun in relation to a Gun Transaction carries a sentence of 5 years to 25 years. A second or subsequent conviction of carrying a handgun in relation to a gun transaction carries a sentence of twenty-five years to life in prison. At the time of Hughes' trial and sentencing, Hughes did not have a prior conviction for carrying a handgun in relation to a gun transaction. Rather, the Court, over the defendant's objection, ascribed a minimum of five years to the first firearm count, and a minimum of twenty-five years to each additional count. The total maximum time for the eight firearm counts was 180 years.

It is clear error for a Court to bootstrap convictions from the same trial and sentencing event and thereby treat them as subsequent convictions. Had Hughes been convicted of a previous firearm conviction,then attributing 25 years to each charge would be permissible. At the time of his trial and sentencing, Hughes did not have a single prior conviction qualifying him for the increased punishment of twenty-five years minimum per count.

Hughes submits that the chain of events should have

been considered as a continuing offense for sentencing purposes and as a result, although Hughes certainly could have been charged with multiple 924 (c)(1) violations, for sentencing purposes Hughes should only have been subjected to five (5) years as the "subsequent" conviction enhancement provisions of 924 (c)(1)(C)(i) cannot apply.

In United States v. Freisinger, 937 F.2d 383, 392 (8th Cir. 1991), the Eighth Circuit wrestled with a situation where the defendant had been charged with and convicted of four separate firearms convictions under 18 U.S.C. § 924 (c)(1) along with an underlying drug trafficking conviction. The defendant had been found with four separate weapons and some narcotics in his vehicle after an inventory search was conducted by law enforcement. The sentencing Court imposed consecutive sentences of five years for each 18 U.S.C. §924 (c)(1) violation. The Defendant appealed and raised the sentencing issue to the Court. That Court determined that 18 U.S.C. §924 (c)(1) required an interpretation of that section to mean that a "second or subsequent conviction" means one arising from a second or subsequent transaction. Freisinger, at 391. As a result the Court held that for sentencing purposes, "...the sentence imposed on multiple section 924 (c)(1) convictions based on a single underlying offense cannot exceed five years." Freisinger, at 392.

Of course the holding in Freisinger, raises the question in the instant case of whether there was a "single underlying offense" as opposed to multiple offenses. There are a number of arguments to support Hughes' submission that what transpired during the course of the conspiracy was a singly underlying offense for purposes of sentencing pursuant to18 U.S.C. §924 (c)(1). As the United States Supreme Court stated as long ago as 1939, "A continuing offense is a continuous, unlawful act or series of acts set on foot by a single impulse and operated by an unintermittent force, however long a time it may occupy." United States v.

Midstate Co., 306 U.S. 161, 166, 59 S.Ct. 412, 414, 83 L.Ed. 563 (1939).

There was no claim that Hughes had used different weapons for each of the 924 (c)(1) convictions. The jury was not asked to decide this fact.

In consideration of the above case law, Hughes should have been ascribed a five year maximum for each offense for a total minimum of forty years.

Viewing the multiple firearms convictions as "first" and then "subsequent" convictions does not follow the rule pronounced in Deal v. United States, 508 U.S. 129 (1993). The facts of this case distinguish it from the factual predicate presented in Deal. Accordingly, Mr. Hughes should not be viewed as having a "second or subsequent conviction" under 18 U.S.C. 924 (c).

Deal concerned a career bank robber with two prior robbery convictions and who was convicted of six more bank robberies and related firearm offenses for which he was sentenced to 105 years. The Deal court did not rely solely on statutory construction in reaching its holding; rather, it concluded that anyone convicted of six bank robberies could be sentenced to 105 years just on the robbery offenses alone (each of the six counts carried a statutory maximum of 20 years), and it was therefore, not *unjust*, for the firearms counts to be counted as "second and subsequent convictions." Justice Stevens, joined by Justices Blackmun and O'Connor, dissented and cited at 146, as part of the reasoning, an opinion of the Eighth Circuit Court of Appeals as follows:

> However, punishing first offenders with twenty-five-year sentences does not deter crime as much as it ruins lives. If, after arrest and conviction, a first offender is warned that he will face a mandatory twenty-year sentence if he commits the same crime again, then the offender will know of the penalty. Having already served at least five years in prison, he

> will have a strong incentive to stay out of trouble. Discouraging recidivism by people who have already been in prison and been released serves a far more valuable purpose than deterring offenders who have yet to be arrested and have no knowledge of the law's penalties." United States v. Jones, 965 F.2d 1507, 1521 (CA8 1992) (internal citation omitted).

The Deal majority, while concluding that a prosecutor has unavoidable power to charge or not charge an offense, implicitly said that power did not include the power to determine the punishment for a charged offense. Deal at 134.

The United States Attorney in this case, however, did exactly what Deal disfavors. The prosecutor did not just make a charging decision, but determined the range of total punishment by the method of charging. This was accomplished by charging the defendant with multiple firearm offenses. No legitimate prosecutorial reason existed for charging separate firearms violations other than to determine the sentencing outcome. Such a practice is forbidden under Deal.

Consequently, under the facts of this case, Mr. Hughes should be viewed as not having any "second or subsequent convictions" under 18 U.S.C. §924 (c). This result is also consistent with the view of Senior Circuit Judge Bright, as expressed by him in his concurring opinion in United States v. Ortiz-Martinez, 1 F.3d 662, 678-79 (8th Cir. 1993).

Therefore, Mr. Hughes submits that the charging of 18 U.S.C. §924 (c) was an abuse of discretion, and the use of §924 (c) to add 175 years consecutively to the guidelines ranges is contrary to the intent of the guidelines and results in a violation of Mr. Hughes' right to due process. Further, the

resulting sentence violated his Fifth and Eighth Amendment rights prohibiting double jeopardy and cruel and unusual punishment.

The Supreme Court has long held that the Eighth Amendment requires a "narrow proportionality" between crime and punishment. Harmelin v. Michigan, 501 U.S. 957, 996 (1991) Reviewing courts should grant broad deference to legislatures in determining the types of crimes punished and the severity of punishment. Id. at 999 quoting Solem v. Helm, 463 U.S. 227, 290 (1983). "[P]roportionality review by the federal courts should be informed by "'objective factors to the maximum possible extent.'". Harmelin, 501 U.S. at 1000 quoting Rummell v. Estelle, 445 U. S. 263, 274-275 (1980) quoting Coker v. Georgia, 433 U.S. 584, 592 (1977). "The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are grossly disproportionate to the crime." Harmelin, 501 U. S. at 997. In Weems v. United States, 217 U.S. 349 (1910), the Supreme Court stated that "it is a precept of justice that punishment for crime should be graduated and proportioned to the offense" and concluded that a sentence of fifteen years in irons at hard labor for falsifying public documents was cruel "in its excess of imprisonment." Id at 366-67, 377.

In Solem v. Helms, 463, U. S. 277, 284, 290 (1983), the Supreme Court held "as a matter of principal that a criminal sentence must be proportionate to the crime for which the defendant has been convicted" and that the Eighth Amendment prohibits "sentences that are disproportionate to the crime committed." In so doing, the Court constructed and engaged in a proportionality analysis under the Eighth Amendment that was to be guided by objective factors. Id at 290-92. Under Solem; a court first considers the "gravity of the offense and the harshness of the penalty." Id. Second, the court must "compare the sentences imposed on other criminals in the same jurisdiction." Id., at 291. Finally,

reviewing courts examine "sentences imposed for commission of the same crime in other jurisdictions." Id. at 291. In applying this three part test, the Solem Court found that a sentence of life imprisonment without possibility of parole for passing a bad check in the amount of $100 was "significantly disproportionate" to the crime, despite the defendant's extensive criminal history and that consequently the prison sentence violated the Eighth Amendment. Id. at 303.

The plurality in Harmelin adjusts the three part test in Solem slightly by requiring that the appellant make a threshold showing that "the crime committed and the sentence imposed leads to an inference of gross disproportionality." Harmelin, 501 U.S. at 1005. Harmelin was convicted of possession of more than 650 grams of cocaine which the Court noted could potentially yield 32,500 to 65,000 doses. Id. at 1002. The Court analyzed the far reaching effects of such a substantial amount of pure cocaine and decided that the threshold showing of disproportionality between crime and sentence had not been met by the appellant. Id at 1003-4.

Since Harmelin the Supreme Court has continued to apply the "gross disproportionality" standard while reiterating that no bright line standard has yet emerged. Lockyer v. Andrade, 538 U.S. 63 (2003) ("Thus, in this case, the only relevant clearly established law. . . is the gross disproportionality principle, the precise contours of which are unclear, [and] applicable only in the 'exceedingly rare' and 'extreme' cases. Id. at 73, citing Harmelin, 501 U. S. at 1001 parallel citation to Solem, 463 U.S. at 290). See also Ewing v. California, 538 U.S. 11, 20 (2003) ("The Eighth Amendment, which forbids cruel and unusual punishment, contains a 'narrow proportionality principle' that 'applies to noncapital sentences.'" [internal citation omitted.]).

In determining whether a term of years is "grossly disproportionate" to a crime, the court compares the gravity

of the offense committed to the harshness of the penalty imposed. This entails consideration of the harm caused or threatened to the victim or to society and the culpability and degree of the defendant's involvement. Culpability is measured by the existence and degree of intent and motive.

CONCLUSION

Blakely applies to Pre-sentence Investigation Reports. As such, the information used to sentence Mr. Hughes must be assigned as a fact by his jury.

The existence and validity of the defendant's prior convictions, as counted in the pre-sentence report investigation, were not decided as a matter of fact by the jury. As such, it was impermissible for the court to enhance his punishments based on prior convictions that were not founded by the trier of fact.

Also, the evidence of guilt presented was insufficient for a finding of guilt beyond a reasonable doubt. The government relied completely on testimony of co-defendants. Each one was motivated by self-interest to shift blame to Mr. Hughes. Each one was encouraged to assign blame to Mr. Hughes in order to maximize the benefit to themselves in their own trials. This is not reliable proof that rises to the level of beyond a reasonable doubt.

Lastly, of the eight firearm convictions, seven were determined to be subsequent convictions. The qualifying predicate firearm conviction was contained in the same multi-count indictment, disposed of at the same trial, and sentenced at the same time. In order to be a predicate conviction, it must be a conviction that exists prior in time to the indictment, trial and sentencing event.

For the foregoing reasons, the Court should grant this Petition for Writ of Certiorari.

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APPENDIX A

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 04-5082
UNITED STATES OF AMERICA,
Plaintiff - Appellee,
versus
TONY ORLANDO HUGHES,
Defendant - Appellant.
Appeal from the United States District Court for the Eastern District of Virginia, at Newport News. Robert C. Doumar, Senior
District Judge. (CR-04-16)
Submitted: September 16, 2005 Decided: October 20, 2005
Before MICHAEL, KING, and DUNCAN, Circuit Judges.
Affirmed by unpublished per curiam opinion.
L. Dickerson Bragg, ST. CLAIR LAW FIRM, Norfolk, Virginia, for
Appellant. Paul J. McNulty, United States Attorney, Michael J.
Elston, Scott W. Putney, Assistant United States Attorneys, Newport
News, Virginia, for Appellee.
Unpublished opinions are not binding precedent in this circuit.
See Local Rule 36(c).

PER CURIAM:
Following a jury trial, Tony Orlando Hughes was convicted of thirty-six counts of a sixty-seven count indictment: one count of conspiracy to possess with intent to distribute and distribute cocaine and cocaine base, in violation of 21 U.S.C. § 846 (2000); sixteen counts of the distribution of cocaine base, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A) (2000); four counts of the distribution of cocaine base, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B) (2000); two counts of the distribution of cocaine base, in violation of §

841(a)(1) and (b)(1)(C) (2000); two counts of the distribution of cocaine, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C) (2000); three counts of possession with the intent to distribute cocaine, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B) (2000); and eight counts of possession of a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1) (2000). Hughes appeals his convictions and 2616-month sentence. We affirm.

Hughes first challenges the sufficiency of the evidence resulting in his convictions. A defendant challenging the sufficiency of the evidence "bears a heavy burden." United States v. Beidler, 110 F.3d 1064, 1067 (4th Cir. 1997) (citation omitted). To determine if there was sufficient evidence to support a conviction, this court considers whether, taking the evidence in the light most favorable to the Government, substantial evidence supports the jury's verdict. Glasser v. United States, 315 U.S. 60, 80 (1942) (citation omitted); United States v. Wills, 346 F.3d 476, 495 (4th Cir. 2003) (citation omitted). The court reviews both direct and circumstantial evidence and permits "the [G]overnment the benefit of all reasonable inferences from the facts proven to those sought to be established." United States v. Tresvant, 677 F.2d 1018, 1021 (4th Cir. 1982) (citations omitted). Witness credibility is within the sole province of the jury, and the court will not reassess the credibility of testimony. United States v. Saunders, 886 F.2d 56, 60 (4th Cir. 1989) (citations omitted). Further, the uncorroborated testimony of a single witness may be sufficient, even if the witness is an accomplice, a co-defendant, or an informant. See United States v. Wilson, 115 F.3d 1185, 1189-90 (4th Cir. 1997).

Fifteen Government witnesses testified against Hughes. Each witness disclosed to the jury that he was testifying pursuant to a plea agreement, each witness was subject to cross-examination, and each witness testified in detail as to drug transactions completed with Hughes. It was for the

jurors to determine what weight to give each witness's testimony. Drawing all inferences in favor of the Government, a reasonable jury could conclude that the evidence was sufficient to convict Hughes beyond a reasonable doubt.

Hughes next contends that his sentence violates the Sixth Amendment because it was based on drug quantities that were not found by the jury and because it was based upon prior convictions that were used to enhance his statutory penalties and to calculate his criminal history. Because Hughes preserved these issues by objecting to the presentence report and at his sentencing hearing based upon Blakely v. Washington, 542 U.S. 296 (2004), this court's review is de novo. See United States v. Mackins, 315 F.3d 399, 405 (4th Cir. 2003) ("If a defendant has made a timely and sufficient Apprendi sentencing objection in the trial court, and so preserved his objection, we review de novo.") (citation omitted). When a defendant preserves a Sixth Amendment error, this court "must reverse unless [it] find[s] this constitutional error harmless beyond a reasonable doubt, with the Government bearing the burden of proving harmlessness." Id. (citations omitted); see United States v. White, 405 F.3d 208, 223 (4th Cir. 2005) (discussing difference in burden of proving that error affected substantial rights under harmless error standard in Fed. R. App. P. 52(a) and plain error standard in Fed. R. App. P. 52(b)).

Even if the disputed quantity of drugs was removed from the sentencing calculation, Hughes' sentence would not have been different. By its verdict, the jury found the Government proved beyond a reasonable doubt that the conspiracy involved at least one and-a-half kilograms of cocaine base ("crack") and at least five kilograms of cocaine. This finding alone placed Hughes in the highest base offense level, thirty-eight. See U.S. Sentencing Guidelines Manual ("USSG") § 2D1.1(c)(1) (2003). Thus, because the actual sentence imposed did not exceed the maximum of the unenhanced guideline range, there was no Sixth Amendment violation.

See United States v. Evans, 416 F.3d 298, 300-01 (4th Cir. 2005) (holding that if sentence does not exceed maximum authorized by facts admitted by defendant or found by jury, there is no Sixth Amendment violation). Moreover, the district court was required to impose a statutorily-mandated sentence for the firearm convictions.
See United States v. Robinson, 404 F.3d 850, 862 (4th Cir. 2005)
("[Even after United States v. Booker, 125 S. Ct. 738 (2005)], a district court has *no* discretion to impose a sentence outside of the statutory range established by Congress for the offense of conviction."). Finally, Hughes' challenge to the use of prior convictions is foreclosed. See United States v. Cheek, 415 F.3d 349, 350 (4th Cir. 2005) (holding that Sixth Amendment not violated when sentence enhanced based on prior convictions that were not charged in indictment or admitted by defendant).
Hughes finally maintains that the district court erred in imposing the "subsequent conviction" enhancement of 18 U.S.C. § 924(c)(1)(C)(i) (2000), arguing that the chain of events surrounding his conviction should be considered one continuing offense for sentencing purposes, or alternatively, that prior to his convictions at trial, he had no convictions under § 924(c)(1); therefore, he should have received five years for each count and not the twenty-five year enhancement provided for "second or subsequent convictions" under § 924(c)(1)(C)(i).
In United States v. Camps, 32 F.3d 102, 106 (4th Cir. 1994), this court concluded that "multiple, consecutive sentences under section 924(c)(1) are appropriate whenever there have been multiple, separate acts of firearm use or carriage, even when all of those acts related to a single, predicate offense." Further, in Deal v. United States, 508 U.S. 129, 132 (1993), the Supreme Court held that, in the context of § 924(c)(1), the term "conviction"
"refers to the finding of guilt by a judge or a jury that

necessarily precedes the entry of a final judgment of conviction" and not to the final judgment of conviction itself. The Supreme Court further concluded that "the language of § 924(c)(1) only requires a 'conviction after the first conviction.'" Deal, 508 U.S. at 135. Under this reasoning, a defendant convicted of multiple § 924(c)(1) violations in one trial could properly receive enhanced sentences for second and subsequent offenses, as at the time of sentencing, he or she will have "prior convictions." Thus, under either theory, Hughes' argument fails.

Accordingly, we affirm Hughes' convictions and sentence. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

UNITED STATES OF AMERICA
v. TONY ORLANDO HUGHES,
Case Number 4:04CR00016-001
USM Number 55764-083
Defendant.

JUDGMENT IN A CRIMINAL CASE
The defendant, TONY ORLANDO HUGHES, was represented by Nathaniel J. Webb, III.
The defendant has been found not guilty on counts 10, 11, 27, 28, 29, 30, 34, 39, 41,44,45, and 64.
The defendant was found guilty on count(s) 1, 2, 3, 7, 8, 9, 12, 13, 18, 19, 23, 24, 25,31, 32, 33, 35, 36, 37, 38, 40, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, and 61 after a plea of not guilty. Accordingly, the defendant is adjudged guilty of the following count(s), involving the indicated offense(s):
T.21:846 Conspiracy to Possess with Intent to Distribute and Distribute Cocaine and Cocaine Base (Felony)
February 5, 2004
Count Number 1

T:21:841(a)(1) and (b)(1)(A)
Distribute Cocaine Base (Felony)
March, 2001
Counts 2, 7, 9, 12, 18, 24, 32, 35, 36, 37, 38, 40, 46, 50, 52 and 54

T.21:841 (a)(1) and (b)(1)(C)
Distribute Cocaine Base (Felony)
Summer 2000
Counts 23 and 31

T.21:841(a)(l) and (b)(l)(B)
Distribute Cocaine Base (Felony)
June, 2001
Counts 49, 57, 58 and 59

T.21:841 (a)(l) and (b)(l)(C)
Distribute Cocaine (Felony)
December, 2000
Counts 3 and 48

T.18:924(c)(l)
Possession of Firearm During and in Relation to a
Drug Trafficking Crime (Felony)
March, 2001
Counts 8, 13, 25, 33, 47, 51, 53 and 55

T.21:941(a)(l) and (b)(l)(B)
Possess with Intent to Distribute Cocaine (Felony)
Summer, 2001
Counts 19, 56 and 61

On motion of the United States, the Court dismissed counts 4, 5,6, 14, 15, 16, 17,20,21,22,26,42,43, 60, 62, 63, 65, 66 and 67 during the trial of this case. As pronounced on November 29,2004, the defendant is sentenced as provided in pages 2 through 8 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984. It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States Attorney of material changes in economic circumstances.
Signed this 1st day of December, 2004.
Robert G. Doumar
United States District Judge

Defendant: TONY ORLANDO HUGHES
Case Number: 4:04CR00016-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of TWO THOUSAND, SIX HUNDRED SIXTEEN (2,616) MONTHS. The term consists of FOUR HUNDRED FIFTY-SIX (456) MONTHS on each of Counts 1,2,7,9, 12,18, 19,24,32,35,36,37,38,40,46,49, 50,52,54,56,57,58,59 and 61, and terms of THREE HUNDRED SIXTY (360) MONTHS on each of Counts 3, 23,31 and 48, all to be served concurrently, a term of SIXTY (60) MONTHS on Count 8 to be served consecutively with sentences imposed on previous counts and a term of THREE HUNDRED (300) MONTHS on each of Counts 13, 25, 33, 47, 51, 53 and 55, to be served consecutively on the sentences imposed on the previous counts *and* consecutively with each other.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this Judgment as follows:

Defendant delivered on to at , with a certified copy of this Judgment.

Mailed:12/3/2004
c: P.O. (2) (3)
Mshl. (4) (2)
U.S.Atty.
U.S.Coll.
Dft. Cnsl.
PTS
Financial
Registrar
ob
United States Marshal
Deputy Marshal

Defendant: TONY ORLANDO HUGHES
Case Number: 4:04CR00016-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of TEN (10) YEARS. This term consists of TEN (10) YEARS on each of Counts 1, 2, 7, 8, 9, 12, 13, 18, 19, 24, 25, 32, 33, 35,36,37,38,40,46,47,49,50,51,52,53,54,55,56,57, 58, 59 and 61 and SIX (6) YEARS on each of Counts 3, 23, 31 and 48, all to run concurrently.

The Probation Office shall provide the defendant with a copy of the standard conditions and any special conditions of supervised release.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

While on supervised release, the defendant shall not commit another federal, state, or local crime.

While on supervised release, the defendant shall not illegally possess a controlled substance.

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

While on supervised release, the defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

Defendant: TONY ORLANDO HUGHES
Case Number: 4:04CR00016-001

STANDARD CONDITIONS OF SUPERVISED RELEASE

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below):

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.

2) The defendant shall report to the probation officer and shall submit a truthful and complete written report :. within the first five days of each month.

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the Probation Officer at least ten days prior to any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances,

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

While on supervised release, pursuant to this Judgment, the defendant shall also comply with the following additional conditions:

1) The defendant shall refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release on supervised release and at least two periodic drug tests thereafter, as directed by the probation officer.

2) The defendant shall participate in a program approved by the United States Probation Office for substance abuse, which program may include residential treatment and testing to determine whether the defendant has reverted to the use of drugs or alcohol, with partial cost to be paid by the defendant, all as directed by the probation officer.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the total monetary penalties under the schedule of payments on Schedule of Payment - Sheet 6.

Count	
1	$100.00
2	$100.00
3	$100.00

7	$100.00
8	$100.00
9	$100.00
12	$100.00
13	$100.00
18	$100.00
19	$100.00
23	$100.00
24	$100.00
25	$100.00
31	$100.00
32	$100.00
33	$100.00
35	$100.00
36	$100.00
37	$100.00
38	$100.00
40	$100.00
46	$100.00
47	$100.00
48	$100.00
49	$100.00
50	$100.00
51	$100.00
52	$100.00
53	$100.00
54	$100.00
55	$100.00
56	$100.00
57	$100.00
58	$100.00
59	$100.00
61	$100.00

Total Assessment $3,600.00
Restitution
FINE

No fines have been imposed in this case.
Defendant: TONY ORLANDO HUGHES
Case Number: 4:04CR00016-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

The special assessments shall be due in full immediately.

Any balance remaining unpaid on the special assessments at the inception of supervision shall be paid by the defendant in installments of not less than $100.00 per month, until paid in full. Said payments shall commence 60 days after defendant's supervision begins.

At the time supervision commences, the probation officer shall take into consideration the defendant's economic status as it pertains to his ability to pay the special assessments ordered and shall notify the court of any change that may need to be made to the payment schedule.

Any special assessment payments may be subject to penalties for delinquency and default.

Nothing in the court's order shall prohibit the collection of any judgment or fine by the United States.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties, including the special assessments, shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the Clerk of the Court. .

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.